

Holland & Knight

31 West 52nd Street | New York, NY 10019 | T 212.513.3200 | F 212.385.9010
Holland & Knight LLP | www.hklaw.com

Duval M. Thompson
(212) 513-3263
duval.thompson@hklaw.com

February 21, 2014

Via EPA Website

Wanda Calderon
FOIA Specialist
United States Environmental Protection Agency
Region 2
290 Broadway, 26th Floor
New York, NY 10007

Re: **EPA ID# NJD981557879 at 333 Hamilton Blvd., South Plainfield, NJ**

Dear Wanda:

Pursuant to the Freedom of Information Act, 5 U.S.C. §§ 552, *et seq.* ("FOIA"), this request concerns the Cornell-Dublier Electronics, Inc. ("CDE") superfund site, located at 333 Hamilton Blvd., South Plainfield, NJ, EPA ID# NJD981557789. On behalf of Exxon Mobil Corporation ("Exxon"), I hereby request the following:

- Draft Remedial Investigation/Feasibility Study Report - Operable Unit 4 (OU4): Bound Brook Cornell-Dublier Electronics Superfund Site ("Draft RI/FS"); and
- Underlying appendices, including figures, tables, and factual data corresponding with the Draft RI/FS.

On November 27, 2013, via FOIA, Exxon requested documents from the U.S. Army Corps of Engineers ("Corps") concerning the CDE Superfund Site Operable Unit 4 ("OU4"). On January 13, 2014, the Corps responded by withholding the Draft Remedial Investigation and its underlying appendices including figures, tables, and factual data used to evaluate the South Plainfield site, and asserting that Draft Remedial Investigation was privileged pursuant to Exemption 5. On a privilege log, the Corps specifically identified 71 documents comprising the Draft Remedial Investigation and its underlying data. (Exxon's Request and Corps' Response,

collectively, **Exhibit A**). Exxon is appealing the Corps' assertion of privilege over the Draft Remedial Investigation and its corresponding data. (**Exhibit B**).

On February 13, 2014, CDE received an e-mail from Sarah Flanagan, Office of Regional Counsel, indicating that the National Remedy Review Board ("NRRB") will review the remedial alternatives that Region 2 is evaluating for the CDE Site Operable Unit 4 Bound Brook on March 13, 2014. (**Exhibit C**). As customary, the NRRB's review process allows parties to submit information addressing any technical issues relevant to the selection of a remedy. Ms. Flanagan further stated that EPA does not have the Draft RI/FS "in a form that EPA can release" but did not cite any FOIA privilege. Ms. Flanagan followed up her e-mail with a February 18 letter informing of the NRRB review along with a CD containing "data and figures collected during the RI/FS process" and inviting stakeholders submissions by March 5, 2014. (**Exhibit D**). The EPA also indicated that it would provide the underlying data to the Draft RI directly to Exxon.

The EPA has released the CD including underlying data for the Draft RI/FS. Presumably, the CD includes data and figures collected during the RI/FS process, including figures and appendices in the Draft RI/FS. Therefore, Exxon respectfully requests that the EPA provide the entire Draft RI/FS. Reviewing the data within the report without context will ultimately hamper the parties from reviewing the alternatives and actively participating in the NRRB comment period.

The incredibly short time period outlined in Ms. Flanagan's e-mail (**Exhibit C**) makes it very difficult to submit comments to the NRRB with comments due in two weeks. As noted above, the Draft RI/FS is essential in relating the data to the alternatives considered. In light of the short NRRB comment period, further delay in providing the Draft RI/FS will prejudice Exxon's ability to participate actively in the NRRB's comment process, which EPA has stated, is important to control response costs and promote consistent and cost effective decisions.

Preemptively, the EPA cannot arbitrarily claim a blanket privilege over factual information containing summaries of past studies and investigations in the Draft Report when the underlying factual data is being released. Indeed, a review of the 2010 Work Plan for the OU-4 Remedial Investigation clearly demonstrates that the Draft Report likely contains summaries of past studies and investigations in the context of the remedial alternatives studied. *See Sierra Club v. U.S. Dep't of Interior*, 384 F. Supp. 2d 1 (D.C. Cir. 2004). The law is clear that factual information and data apart from the deliberative process recommendations and analyses cannot be protected. *See Nat'l Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1117 (9th Cir. 1988) ("factual material that does not reveal the deliberative process is not protected by [Exemption 5]."); *Environ Tech Int'l, Inc. v. U.S. E.P.A.*, 371 F.3d 370 (7th Cir. 2004) ("[T]he deliberative process privilege typically does not justify the withholding of purely factual material."); *Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 854 (3d Cir. 1995) ("The deliberative process privilege does not protect factual information, even if such information is contained in an otherwise protectable document, as long as the information is severable."); *Julian v. Dept' of Justice*, 806 F.2d 1411, 1419 (9th Cir. 1986) ("communications containing purely factual material are not typically within the purview of Exemption 5.").

In *Nat'l Assoc. of Home Builders v. Norton*, 309 F.3d 26 (D.C. Cir. 2002), the plaintiffs sought site-specific information that was determined to be predecisional because the State agency prepared the information in part to "assist the FWS in making its determinations under the Endangered Species Act." *Id.* at 39. The D. C. Circuit, however, decided that the site information did not satisfy the "deliberative" prong because "[n]othing in the requested site-specific information reflect[ed] [the] agency's preliminary positions or ruminations about a particular policy judgment." *Id.*

Moreover, Exemption 5's express language protects:

[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party *other* than an agency in litigation with the agency.

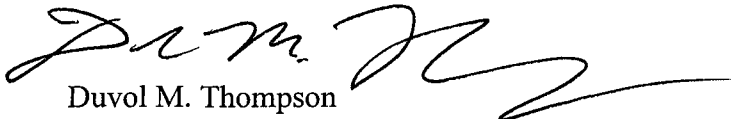
5 U.S.C. § 552(b)(5). The Draft RI/FS, a document prepared by an outside consultant, does not fall under "inter-agency or intra-agency" memoranda. Thus, Exemption 5 does not protect the Draft RI/FS or its supporting underlying data which the EPA has already conceded it will provide.

FOIA requires the release of all reasonably segregable portions of information which are not themselves exempt. *See* 5 U.S.C. § 552(b). If, for any reason, materials reasonably within the scope of this request are withheld as failing under FOIA exemption or exemptions covered by 5 U.S.C. § 552, please identify and describe, with specificity, each document being withheld, the basis for withholding it, and whether any exempt material can be deleted thereby allowing the document with deleted portions to be provided. We are aware of our rights to administrative appeal set forth in 5 U.S.C. § 552(a)(6)(A)(I) and are prepared to pursue them if necessary.

In light of the EPA's decision to provide the underlying data, Exxon requests that the EPA release the entire Draft RI/FS. Should the EPA claim that the Draft RI/FS falls under Exemption 5, the EPA has a duty to segregate the factual information and analysis in the Draft RI/FS from any deliberative process materials. FOIA requires the release of all reasonably segregable portions of information, which are not themselves exempt. *See* 5 U.S.C. § 552(b).

If you have any questions please contact me at (212) 513-3263. Your prompt attention to this request is appreciated.

Very truly yours,



Duval M. Thompson

Enclosures

EXHIBIT A

Holland & Knight

31 West 52nd Street | New York, NY 10019 | T 212.513.3200 | F 212.385.9010
Holland & Knight LLP | www.hklaw.com

Duvol M. Thompson
(212) 513-3263
duvol.thompson@hklaw.com

November 27, 2013

Via E-mail (foia-nwk@usace.army.mil) & Overnight Mail

CENWK-OC
Freedom of Information Act Request
U.S. Army Corps of Engineers,
Kansas City District
601 E. 12th Street
Kansas City, MO 64106-2824

Re: EPA ID# NJD981557879 at 333 Hamilton Blvd., South Plainfield, NJ - EPA ID#
NJSFN0204260 at Woodbrook Road Dump

To Whom it May Concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. §§ 552, *et seq.* ("FOIA"), this request concerns the Cornell-Dubilier Electronics, Inc. ("CDE") superfund sites, located at 333 Hamilton Blvd., South Plainfield, NJ, EPA ID# NJD981557789 and the Woodbrook Road Dump in Edison South Plainfield, NJ, EPA ID# NJSFN0204260. On behalf of Exxon Mobil Corporation ("Exxon"), I hereby request the following report:

- United States Army Corps of Engineers, Kansas District - "Cornell-Dubilier Electronics Superfund Site - South Plainfield, New Jersey: Operable Unit 4: Bound Brook - Technical Memorandum," dated June 2009 ("2009 Technical Memorandum"); please also provide all corresponding attachments and appendices to the 2009 Technical Memorandum in their entirety.

On pages 1-2 and 1-3 of the 2009 Technical Memorandum, the document references a number of technical documents reviewed in preparation of the 2009 Technical Memorandum. I hereby also request the following referenced reports:

- Data Evaluation Report for Cornell-Dubilier Electronics Superfund Site. South Plainfield, Middlesex County, New Jersey (FWENC, 2001a);

- Remedial Investigation Report for OU1, Cornell-Dubilier Electronics Superfund Site, South Plainfield, Middlesex County, New Jersey (FWENC, 2001b);
- Final Report, Ecological Evaluation for the Cornell-Dubilier Electronics Site (USEPA, 1999);
- Floodplain Soil/Sediment Sampling and Analysis Summary Report (Weston, 2000);
- Preliminary Conceptual Site Model for Operable Unit 4 (Tetra Tech EC Inc., May 2008);
- Sampling Report, Cornell-Dubilier Electronics Site for Sample Dates December 2007 and January 2008 (USEPA, 2008);
- OU4 project kick-off meeting with the USACE-KCD and the USEPA on October 15, 2008; and
- OU4 scoping meeting with USACE-KCD, USEPA, and other stakeholder agencies on January 22, 2009.

Finally, Exxon requests any documents, reports, or investigations performed by the U.S. Army Corps of Engineers, on Spring Lake or Cedar Brook (both bodies of water connected to Bound Brook) in connection with the CDE Superfund sites or Bound Brook.

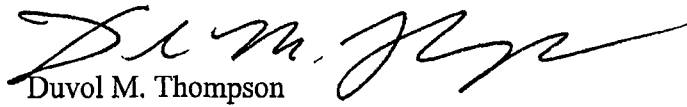
FOIA requires the release of all reasonably segregable portions of information, which are not themselves exempt. *See* 5 U.S.C. § 552(b). If, for any reason, materials reasonably within the scope of this request are withheld as falling under FOIA exemption or exemptions covered by 5 U.S.C. § 552, please identify and describe, with specificity, each document being withheld, the basis for withholding it, and whether any exempt material can be deleted thereby allowing the document with deleted portions to be provided. We are aware of our rights to administrative appeal set forth in 5 U.S.C. § 552(a)(6)(A)(I) and are prepared to pursue them if necessary.

CENWK-OC
November 27, 2013
Page 3

If you have any questions please contact me at (212) 513-3263. Your prompt attention to this request is appreciated.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "Duval M. Thompson", with a stylized flourish at the end.

Duval M. Thompson

DMT:mlr



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, KANSAS CITY DISTRICT
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

January 13, 2014

Office of Counsel
(FOIA 14-13)

Mr. Duvol M. Thompson
Holland & Knight
31 West 52nd Street
New York, New York 10019

Dear Mr. Thompson:

This is in response to your Freedom of Information Act (FOIA) request dated and received in this office via email on November 27, 2013. Your request is for the following information:

1. United States Army Corps of Engineers, Kansas District - "Cornell Dubilier Electronics Superfund Site - South Plainfield, New Jersey: Operable Unit 4: Bound Brook - Technical Memorandum," dated June 2009 ("2009 Technical Memorandum"); please also provide all corresponding attachments and appendices to the 2009 Technical Memorandum in their entirety.

You have also requested the following technical documents referenced on pages 1-2 and 1-3 of the 2009 Technical Memorandum that were reviewed in preparation of the Technical Memorandum. The documents are as follows:

1. Data Evaluation Report for Cornell-Dubilier Electronics Superfund Site. South Plainfield, Middlesex County, New Jersey (FWENC, 2001a);
2. Remedial Investigation Report for OU1, Cornell-Dubilier Electronics Superfund Site, South Plainfield, Middlesex County, New Jersey (FWENC, 2001b);
3. Final Report, Ecological Evaluation for the Cornell-Dubilier Electronics Site (USEPA, 1999);
4. Floodplain Soil/Sediment Sampling and Analysis Summary Report (Weston, 2000);
5. Preliminary Conceptual Site Model for Operable Unit 4 (Tetra Tech EC Inc., May 2008);
6. Sampling Report, Cornell-Dubilier Electronics Site for Sample Dates December 2007 and January 2008 (USEPA, 2008);

7. OU4 project kick-off meeting with USACE-KCD and the USEPA on October 15, 2008; and
8. OU4 scoping meeting with USACE-KCD, USEPA, and other stakeholder agencies on January 22, 2009.

Finally, you requested any documents, reports or investigations performed by the U.S. Army Corps of Engineers, on Spring Lake or Cedar Brook (both bodies of water connected to Bound Brook) in connection with the CDE Superfund sites or Bound Brook.

On December 3, 2013, our office sent you an email regarding your FOIA request. At that time, our office informed you that we determined your request was not perfected because it did not contain a willingness to pay statement and that we could not begin to process your request until we received a statement for your office agreeing to pay all fees associated with your request. We received a follow-up email from your office on December 3, 2013, informing us that your company is willing to pay the fees associated with your request and to proceed with processing the relevant records.

Enclosed please find a CD which contains documents responsive to your request. We have been advised by our Planning, Programs, and Project Management Division that we do not have documents responsive to Items 1 and 4 that were referenced on pages 1-2 and 1-3 of the 2009 Technical Memorandum. We have been advised that you will need to submit a FOIA request to the Environmental Protection Agency Region II to obtain this information. A list of documents responsive to your request that have been redacted or withheld, as allowed under Exemption 5 of the FOIA is enclosed.

Exemption 5 of the FOIA, 5 U.S.C. § 552(5), allows the withholding of internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether within or among agencies. Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

As a commercial requester you are responsible for all search, review and duplication costs associated with the processing of your request. Under the FOIA, professional search and review is \$44.00 per hour, clerical search and review is \$20.00 per hour, duplication cost is \$0.15 per page, and oversized drawings or map costs are the actual cost to us to reproduce these documents. When assessable fees are likely to exceed \$250.00, advance payment is required prior to processing the request.

The costs associated with processing your request are as follows:

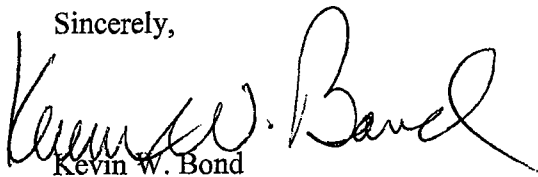
Professional Search and Review (4 hours @ \$44.00 per hour)	= \$176.00
Computer Product Output (1 CD @ \$1.00 each)	= \$ 1.00
TOTAL	= \$177.00

Please make your check in the amount of \$177.00 payable to the Treasurer of the United States and mail it to the U.S. Army Corps of Engineers, Kansas City District; ATTN: Office of Counsel, Room 665; 601 East 12th Street; Kansas City, Missouri 64106-2824. Payment is expected upon your receipt of this letter.

An Agency response to a FOIA request that certain requested records are exempt from release is a denial of the request. I trust that you will appreciate the considerations on which the determination is based and the thoroughness of the search for responsive documents. However, because your request has been denied in part, you are advised of your right to appeal these determinations to the Secretary of the Army by addressing your appeal through this office. The envelope should bear the notation "Freedom of Information Act Appeal" and should be sent to the U.S. Army Corps of Engineers, Kansas City District; ATTN: Office of Counsel, Room 665; 601 East 12th Street; Kansas City, Missouri 64106-2824. An appeal must be received within 60 days of the date of this letter.

If you have any questions, you may contact Kacy Campbell-Patti, Paralegal Specialist, at 816-389-3472, or by facsimile at 816-389-2019.

Sincerely,



Kevin W. Bond
District Counsel

Enclosures

FOIA REQUEST -14-13
DOCUMENTS WITHHELD/REDACTED

NO.	DATE	DOCUMENT	PAGES	EXEMPTION
1.	2008-10-15	Cornell Dubilier – OU4 Kick Off Meeting Internal Corps Notes	5	Exemption 5 Predecisional/Deliberative Process
2.	2012-11-30	Letter RE: Draft Remedial Investigation Report – Operable Unit 04 (OU-4): Bound Brook Cornell-Dubilier Electronics Superfund Site, South Plainfield NJ, U.S. Army Corps of Engineers Contract Number W912DQ-11-D-3009, TO 0013	2	Exemption 5 Predecisional/Deliberative Process
3.	November 2012	DRAFT – Remedial Investigation Report including figures and appendixes – Operable Unit 04 (OU-4): Bound Brook Cornell-Dubilier Electronics Superfund Site, South Plainfield NJ, U.S. Army Corps of Engineers Contract Number W912DQ-11-D-3009, TO 0013	145	Exemption 5 Predecisional/Deliberative Process
4.	2012	DRAFT - RI Chapter 1 Figures	42	Exemption 5 Predecisional/Deliberative Process
5.	2012	DRAFT - RI Chapter 2 Figures	22	Exemption 5 Predecisional/Deliberative Process
6.	2012	DRAFT – RI Chapter 3 Figures	30	Exemption 5 Predecisional/Deliberative Process
7.	2012	DRAFT – RI Chapter 4 Figures	12	Exemption 5 Predecisional/Deliberative Process
8.	2012	DRAFT – RI Chapter 5 Figures	65	Exemption 5 Predecisional/Deliberative Process
9.	2012	DRAFT – RI Chapter 6 Figures	125	Exemption 5 Predecisional/Deliberative Process
10.	2012	DRAFT – RI Chapter 7 Figures	17	Exemption 5 Predecisional/Deliberative Process
11.	NA	DRAFT Appendix A – Pennoni Land Surveying Map for Floodplain Soil Boring Grids	1	Exemption 5 Predecisional/Deliberative Process

NO.	DATE	DOCUMENT	PAGES	EXEMPTION
12.	NA	DRAFT Appendix A – Pennoni Land Surveying Map for Floodplain Soil Boring Transects	1	Exemption 5 Predecisional/Deliberative Process
13.	NA	DRAFT Appendix A – Pennoni Land Surveying Map for Water level Meters	1	Exemption 5 Predecisional/Deliberative Process
14.	NA	DRAFT Appendix A – Pennoni Land Surveying Report for 2010 Field Work – Bound Brook	63	Exemption 5 Predecisional/Deliberative Process
15.	2012-11-27	DRAFT Appendix B – Technical Report Hydrographic and Side Scan Sonar Survey New Market Pond	24	Exemption 5 Predecisional/Deliberative Process
16.	2012	DRAFT Appendix C – Supplemental Contamination Levels in Upstream Reaches of the OU4 Study Area	3	Exemption 5 Predecisional/Deliberative Process
17.	NA	DRAFT Appendix D – Supplemental Statistics on Detected Contaminants in Surface Soil and Surface Sediment	15	Exemption 5 Predecisional/Deliberative Process
18.	NA	DRAFT Appendix E – Recently Deposited Locations	2	Exemption 5 Predecisional/Deliberative Process
19.	2012	DRAFT Appendix F – Supplemental May Surface Quality Plots	13	Exemption 5 Predecisional/Deliberative Process
20.	NA	DRAFT Appendix G – Tabulation of Analytical Results	32	Exemption 5 Predecisional/Deliberative Process
21.	NA	DRAFT Appendix H-1 Bound Brook Sediment Probing Notes	344	Exemption 5 Predecisional/Deliberative Process
22.	NA	DRAFT Appendix H-1 – New Market Pond Sediment Probing Field Notes	47	Exemption 5 Predecisional/Deliberative Process
23.	NA	DRAFT Appendix H-2 – NMP Bathymetric Survey and SSS field notes	7	Exemption 5 Predecisional/Deliberative Process
24.	NA	DRAFT Appendix H-2 – NMP SSS Grab Sample and Confirmatory Core Log	58	Exemption 5 Predecisional/Deliberative Process

NO.	DATE	DOCUMENT	PAGES	EXEMPTION
25.	NA	DRAFT Appendix H-2 b – NMP SSS Grab Sample Field Notes	5	Exemption 5 Predecisional/Deliberative Process
26.	NA	DRAFT Appendix H-3 - Bound Brook and Green Brook LRC Field Notes	67	Exemption 5 Predecisional/Deliberative Process
27.	NA	DRAFT Appendix H-3 – LRC classification log	99	Exemption 5 Predecisional/Deliberative Process
28.	NA	DRAFT Appendix H-3 - NMP LRC Field Notes	4	Exemption 5 Predecisional/Deliberative Process
29.	NA	DRAFT Appendix H-4 – Floodplain Soil Borings Classification Log	117	Exemption 5 Predecisional/Deliberative Process
30.	NA	DRAFT Appendix H-4 - Floodplain Soil Boring Field Notes	90	Exemption 5 Predecisional/Deliberative Process
31.	NA	DRAFT Appendix H-5 – Deep Soil Borings Classification Log	10	Exemption 5 Predecisional/Deliberative Process
32.	NA	DRAFT Appendix H-5 - Deep Soil Borings Field Notes	4	Exemption 5 Predecisional/Deliberative Process
33.	NA	DRAFT Appendix H-6 - Ekman Dredge and Sediment Trap Field Notes	32	Exemption 5 Predecisional/Deliberative Process
34.	NA	DRAFT Appendix H-7 – High Resolution Core Classification Log	12	Exemption 5 Predecisional/Deliberative Process
35.	NA	DRAFT Appendix H-7 – High Resolution Core Classification Log	3	Exemption 5 Predecisional/Deliberative Process
36.	NA	DRAFT Appendix H-7 - High Resolution Core Field Notes	8	Exemption 5 Predecisional/Deliberative Process
37.	NA	DRAFT Appendix H-7 – High Resolution Core Processing Notes Summary Table	3	Exemption 5 Predecisional/Deliberative Process

NO.	DATE	DOCUMENT	PAGES	EXEMPTION
38.	July 2011	DRAFT Appendix H-8 - July 2011 Stream Flow Survey Field Notes	25	Exemption 5 Predecisional/Deliberative Process
39.	May 2012	DRAFT Appendix H-8 - May 2012 Stream Flow Survey Field Notes	34	Exemption 5 Predecisional/Deliberative Process
40.	May 2012	DRAFT Appendix H-8 - May 2012 Water Quality Field Notes	46	Exemption 5 Predecisional/Deliberative Process
41.	NA	DRAFT Appendix H-9 - Porewater Sampler Location Recon Field Notes	16	Exemption 5 Predecisional/Deliberative Process
42.	NA	DRAFT Appendix H-10 - Geological Survey Field Notes	16	Exemption 5 Predecisional/Deliberative Process
43.	2012	DRAFT Appendix I - Overlay of Proposed Soil boring locations of public lands	9	Exemption 5 Predecisional/Deliberative Process
44.	2012	DRAFT Appendix J - NJDEP Bound Brook Permit Equivalency -- General Permit No. 4	5	Exemption 5 Predecisional/Deliberative Process
45.	NA	DRAFT Appendix K - Sediment Data	2900	Exemption 5 Predecisional/Deliberative Process
46.	NA	DRAFT Appendix K - Soil Data	1640	Exemption 5 Predecisional/Deliberative Process
47.	NA	DRAFT Appendix K - Tissue data	2460	Exemption 5 Predecisional/Deliberative Process
48.	NA	DRAFT Appendix L-1 - Sed Probing and SSS Grab Samples	39	Exemption 5 Predecisional/Deliberative Process
49.	NA	DRAFT Appendix L-2 - Low RES Cores - TIC Only	1056	Exemption 5 Predecisional/Deliberative Process
50.	NA	DRAFT Appendix L-2 - Low Res Cores validated	39	Exemption 5 Predecisional/Deliberative Process

NO.	DATE	DOCUMENT	PAGES	EXEMPTION
51.	NA	DRAFT Appendix L-3 – Floodplain Soil Borings TICs Only	24	Exemption 5 Predecisional/Deliberative Process
52.	NA	DRAFT Appendix L-3 – Floodplain Soil Borings - validated	24	Exemption 5 Predecisional/Deliberative Process
53.	NA	DRAFT Appendix L-4 - HRC Ekman Sed Trap – TEQs Only	617	Exemption 5 Predecisional/Deliberative Process
54.	NA	DRAFT Appendix L-4 - HRC Ekman Sed Trap – TEQs Only	617	Exemption 5 Predecisional/Deliberative Process
55.	NA	DRAFT Appendix L-5 - Water Column Validated	67	Exemption 5 Predecisional/Deliberative Process
56.	NA	DRAFT Appendix L-6 - Porewater MEDD-VOCs	15	Exemption 5 Predecisional/Deliberative Process
57.	NA	DRAFT Appendix L-7 – REF Area TEQ TIC Only	252	Exemption 5 Predecisional/Deliberative Process
58.	NA	DRAFT Appendix L-7 - Ref Area validated	252	Exemption 5 Predecisional/Deliberative Process
59.	NA	DRAFT Appendix L – R2Valid Values Reference Manual August	342	Exemption 5 Predecisional/Deliberative Process
60.	NA	DRAFT Appendix M-1 – Bound Brook Data Validation Report (LRCs and Soil Borings)	193	Exemption 5 Predecisional/Deliberative Process
61.	NA	DRAFT Appendix M-1 – CLP Case Narrative (LRCs and Soil Borings)	1111	Exemption 5 Predecisional/Deliberative Process
62.	NA	DRAFT – Appendix M-2 - Bound Brook Data Validation Report (HRC and Ekman)	163	Exemption 5 Predecisional/Deliberative Process
63.	NA	DRAFT – Appendix M-3 - Bound Brook Data Validation Report (Sed Trap and Ekman)	80	Exemption 5 Predecisional/Deliberative Process

NO.	DATE	DOCUMENT	PAGES	EXEMPTION
64.	NA	DRAFT – Appendix M-4 - Bound Brook Data Validation Report (Porewater VOC)	20	Exemption 5 Predecisional/Deliberative Process
65.	NA	DRAFT – Appendix M-5 - Bound Brook Data Validation Report (Water Column)	87	Exemption 5 Predecisional/Deliberative Process
66.	NA	DRAFT – Appendix M-5 - CLP Case Narrative (Water Column)	26	Exemption 5 Predecisional/Deliberative Process
67.	NA	DRAFT – Appendix N-1 - Daily Quality Control Forms	267	Exemption 5 Predecisional/Deliberative Process
68.	2011-04-12	DRAFT Appendix N-2 – Technical Systems Audit – High Resolution Cores	6	Exemption 5 Predecisional/Deliberative Process
69.	2011-05-12	DRAFT Appendix N-2 - Technical Systems Audit Floodplain Soil Boring	6	Exemption 5 Predecisional/Deliberative Process
70.	2011-09-21	DRAFT Appendix N-2 – Technical Systems Audit – Surface Water	6	Exemption 5 Predecisional/Deliberative Process
71.	2012-08-02	DRAFT Appendix N-2 - Technical Systems Audit – Reference Area Toxicity Sampling	6	Exemption 5 Predecisional/Deliberative Process

EXHIBIT B

Holland & Knight

31 West 52nd Street | New York, NY 10019 | T 212.513.3200 | F 212.385.9010
Holland & Knight LLP | www.hklaw.com

Duval M. Thompson
(212) 513-3263
duval.thompson@hklaw.com

February 21, 2014

Via E-mail (foia-nwk@usace.army.mil) & Overnight Mail

CENEK-OC
Freedom of Information Act Appeal
U.S. Army Corps of Engineers
Kansas City District
601 E. 12th Street
Kansas City, MO 64106-2824

Re: Freedom of Information Act ("FOIA") Appeal - Initial FOIA Request, dated
November 27, 2013

Dear Mr. Bond:

On November 27, 2013, on behalf of Exxon Mobil Corporation ("Exxon"), Exxon requested documents from the U.S. Army Corps of Engineers ("Corps") under the Freedom of Information Act ("FOIA") concerning the Cornell-Dublier Electronics, Inc. ("CDE") superfund site, located at 333 Hamilton Blvd., South Plainfield, New Jersey (EPA ID# NJD981557789). On January 13, 2014 we received the Corps' response to the Request in a letter signed by Kevin W. Bond, District Counsel. Exxon writes to appeal the Corps' response withholding certain documents responsive to its Request. Copies of the Request and the Corps' determination, which is the subject of this appeal, are together attached as **Exhibit A** for your convenience. In particular, Exxon hereby requests that the Corps release the Draft Remedial Investigation Report - Operable Unit 4 (OU-4): Bound Brook Cornell-Dubilier Electronics Superfund Site" and the corresponding appendices including Figures, Tables, and factual data used to evaluate the South Plainfield Site ("Draft Report") specifically identified as the 71 documents listed in the log attached to the Corps January 13, 2014 response.

On February 13, 2014 CDE received an e-mail from Sarah Flanagan, Office of Regional Counsel, indicating that the National Remedy Review Board ("NRRB") will review the remedial alternatives that Region 2 is evaluating for the CDE Site Operable Unit 4 ("OU4") Bound Brook on March 13, 2014. (**Exhibit B**). Ms Flanagan further stated that EPA does not have the Draft

RI/FS "in a form that EPA can release" but did not cite any FOIA privilege. Ms. Flanagan followed up her e-mail with a February 18 letter informing about the NRRB review along with a CD containing "data and figures collected during the RI/FS process" and has invited stakeholders submissions by March 5, 2014. (Exhibit C). As customary, the NRRB's review process allows parties to submit information addressing any technical issues relevant to the selection of a remedy. Exxon Mobil Corporation is an indemnitor under a reservation of rights to certain insurers who provided insurance to CDE for claims in excess of \$10 million.

The Corps January 13, 2014 response to Exxon's FOIA request cited Exemption 5's deliberative process privilege. In refusing to release this Draft Report and supporting data The release of the data underlying the Draft Report to the NRRB for review and made available for stakeholder comment, demonstrates that the Corps can no longer claim FOIA Exemption 5's deliberative process privilege in order to withhold documents responsive to Exxon's preceding FOIA requests. *See* 5 U.S.C. § 552(b)(5). EPA's release of a CD with data and figures collected during the RI/FS process, including presumably figures and appendices in the Draft Report, demonstrates that the Corps' blanket assertion of privilege over the 71 documents in its log was in error.

Neither the Corps nor the EPA can arbitrarily claim a blanket privilege over factual information containing summaries of past studies and investigations in the Draft Report when the underlying factual data is being released. Indeed, a review of the 2010 Work Plan for the OU- 4 Remedial Investigation clearly demonstrates that the Draft Report likely contains summaries of past studies and investigations in the context of the remedial alternatives studied. *See Sierra Club v. U.S. Dep't of Interior*, 384 F. Supp. 2d 1 (D.C. Cir. 2004). Further, the blanket assertion of privilege violates the *Vaughn* index requirements that articulate a reasoned basis behind the assertion of the privilege and to released non-privileged information.¹ "A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption." *Citizens Common on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). The log that the Corps provided clearly does not meet the requirement of explaining how the disclosure would damage the Corps' interests. *Id.* The law is clear that factual information and data apart from the deliberative process recommendations and analyses cannot be protected. *See Nat'l Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1117 (9th Cir. 1988) ("factual material that does not reveal the deliberative process is not protected by [Exemption 5]."); *Environ Tech Int'l, Inc. v. U.S. E.P.A.*, 371 F.3d 370 (7th Cir. 2004) ("[T]he deliberative process privilege typically does not justify the withholding of purely factual material."); *Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 854 (3d Cir. 1995) ("The deliberative process privilege does not protect factual information, even if such information is contained in an otherwise protectable document, as long as the information is severable."); *Julian v. Dept' of Justice*, 806 F.2d 1411, 1419 (9th Cir.

¹ *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) (the court rejected an agency's conclusory affidavit stating that requested FOIA documents were subject to exemption).

1986) ("communications containing purely factual material are not typically within the purview of Exemption 5.").

In *Nat'l Assoc. of Home Builders v. Norton*, 309 F.3d 26 (D.C. Cir. 2002), the plaintiffs sought site-specific information that was determined to be predecisional because the State agency prepared the information in part to "assist the FWS in making its determinations under the Endangered Species Act." *Id.* at 39. The D. C. Circuit, however, decided that the site information did not satisfy the "deliberative" prong because "[n]othing in the requested site-specific information reflect[ed] [the] agency's preliminary positions or ruminations about a particular policy judgment." *Id.*

Moreover, Exemption 5's express language protects:

[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party *other* than an agency in litigation with the agency.

5 U.S.C. § 552(b)(5). The Draft Report, a document prepared by an outside consultant, does not fall under "inter-agency or intra-agency" memoranda. Thus, Exemption 5 does not protect the Draft Report or its supporting underlying data.

The release of the Draft Report is critical for two reasons. First, On April 11, 2013, the United States Department of Justice ("DOJ") filed a Motion to Enter a Consent Decree ("Motion to Enter") in the action captioned *United States of America v. Cornell-Dubilier Electronics, Inc.*, 12-cv-05407-JLL-MA. In support of its Motion to Enter, the DOJ filed expert opinions relying on data contained within the requested Draft Report for OU-4. In particular, the report submitted by Gayle Koch contains costs estimates based on the likely remedial alternative selected for OU-4. We believe her opinion was based on information and analysis found in the Draft Report and underlying documents and data. Release of merely the underlying "data and figures" is not sufficient unless that data can be analyzed in the context of the information on alternatives considered in the Draft Report.

Second, the incredibly short time period outlined in Ms. Flanagan's e-mail makes it very difficult to submit comments to the NRRB. The CD with the data was provided on February 19 with comments due in two weeks. As noted above, the Draft Report is essential in relating the data to the alternatives considered. In light of the short NRRB comment period, further delay in providing the Draft Report will prejudice Exxon's ability to participate actively in the NRRB's comment process, which EPA has stated, is important to control response costs and promote consistent and cost effective decisions.

In light of the above, we appeal the Corps January 13, 2014 denial of our FOIA and request immediate release of the full Draft Report and underlying data in the log attached to the Corps January 13, 2014 letter. However, should the Corps still claim that the Draft reports falls under Exemption 5, the Corps has a duty to segregate the factual information and analysis in the

CENEK-OC
February 21, 2014
Page 4

Draft Report from any deliberative process materials. FOIA requires the release of all reasonably segregable portions of information, which are not themselves exempt. *See* 5 U.S.C. § 552(b). Therefore, in the alternative, the Corps should produce the Report and the underlying data in the log in redacted form ASAP.

If you have any questions please contact me at (212) 513-3263. Your prompt attention to this appeal is appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "Duval M. Thompson", with a long horizontal flourish extending to the right.

Duval M. Thompson

Enclosure

EXHIBIT C

From: Ettinger, Jonathan [<mailto:JME@foleyhoag.com>]

Sent: Thursday, February 13, 2014 12:45 PM

To: Maniatis, George L.; Mary Ann D'Amato Esq. (Maryann.Damato@mendes.com); Jonathan P. McHenry (jmchenry@connellfoley.com); Neil V. Mody (nmody@connellfoley.com); Howard T. Weir, Esq. (hweir@howardweir.com)

Cc: Sanoff, Robert; Toriello, John (NYC - X73366); Gerson, Zachary; Marinelli, Marisa (NYC - X73239)

Subject: FW: CDE Site - OU4 NRRB Review

FYI

Jonathan M. Ettinger | Partner

Seaport West
155 Seaport Boulevard
Boston, Massachusetts 02210-2600

617 832 1195 phone
617 832 7000 fax
617 947 4850 mobile

www.foleyhoag.com

Read the Policyholder Counsel Blog at www.policyholdercounsel.com

Read the Law and the Environment Blog at www.lawandenvironment.com

From: Flanagan, Sarah [<mailto:Flanagan.Sarah@epa.gov>]

Sent: Thursday, February 13, 2014 11:49 AM

To: Sanoff, Robert; Ettinger, Jonathan

Subject: CDE Site - OU4 NRRB Review

Counselors:

This is to let you know that EPA's National Remedy Review Board will be reviewing the remedial alternatives that Region 2 is evaluating for the Cornell-Dubilier Electronics (CDE) Site, Operable Unit 4 (Bound Brook), at its meeting in March 2014. The CDE Site is on the agenda for March 13, 2014.

In the next few days -- probably next Tuesday, February 18, 2014 -- EPA will send you a letter informing you about the NRRB review and CDE's opportunity to submit information to the NRRB addressing any technical issues that you think are relevant to the selection of a remedy. We are also going to provide a CD with data and figures collected during the RI/FS. The letter will ask for stakeholder submissions by March 5, 2014.

Given the brief window, I wanted to give you this heads-up, so you can be on the lookout for the letter and information.

Regards,

-Sarah

Sarah P. Flanagan
Office of Regional Counsel, NJ Superfund Branch
USEPA, Region 2
290 Broadway, 17th Floor
New York, NY 10007
Tel: 212-637-3136

This email may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review of, reliance on, or distribution by others or forwarding without the express permission of the sender is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

EXHIBIT D



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

290 BROADWAY

NEW YORK, NEW YORK 10007

February 18, 2014

EMAIL & OVERNIGHT DELIVER

Robert Sanoff, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210

**Re: Cornell-Dubilier Electronics Superfund Site
Opportunity to Submit Comments to National Remedy Review Board**

Dear Mr. Sanoff:

The purpose of this letter is to inform you of the opportunity to submit a statement related to the selection of a remedy for operable unit 4 (OU4) at the Cornell-Dubilier Electronics (CDE) Superfund site, the contaminated sediments of the Bound Brook.

The U.S. Environmental Protection Agency (EPA) will be releasing a Proposed Plan to the public prior to September 30, 2014, to be followed by a public comment period. Based on the remedial investigation/feasibility study (RI/FS) that EPA has conducted for OU4 of the CDE site, EPA is evaluating a number of remedial alternatives to address contamination associated with the OU4. The areas to be addressed by an OU4 remedy, and the remedial approaches under consideration, are in four categories, as follows:

- Sediment and floodplain soils contaminated with PCBs near and downstream of the former CDE facility - EPA is evaluating dredging/excavating of sediments and excavation of soils, and some combination of dredging/excavating and capping;
- A source area of PCB-contaminated capacitors and debris in the floodplain near the former CDE facility - EPA is evaluating containment and excavation and off-site disposal, with treatment as necessary prior to disposal; and
- An area of contaminated groundwater discharging to the Bound Brook adjacent to and downgradient of the former CDE facility - EPA is evaluating hydraulic containment, a permeable reactive barrier and a reactive cap.

In additional, EPA is evaluating the following additional action at the former CDE facility as part of OU4:

- A municipal water line of unknown integrity currently crosses the former CDE facility under the asphalt cap - EPA is evaluating replacing the water line in its current location

Robert Sanoff, Esq.
February 18, 2014
Page 2

and replacement in a new location that does not pass beneath the cap.

The NRRB reviews proposed Superfund cleanup decisions to assure they are consistent with Superfund law, regulations, and guidance. Given the number of remedial decisions that are made each year, the NRRB reserves its reviews to site remedies of a certain magnitude, that is, those remedies that are greater than \$25 million. The cost for the remedial alternatives being evaluated by EPA to address the four concerns identified above, including the Region's likely preferred alternative, exceed the \$25 million threshold for NRRB review.

A review by the NRRB takes place during the later stages of the FS preparation, prior to the release of the Proposed Plan. During the development of the FS for OU4 of the CDE site, the Region has considered whether the remedial action would trigger the need to consult the NRRB and has concluded that it does. Currently, the remedial proposal for OU4 of the CDE site is on the Board's agenda for its March meeting, which will be held during the week of March 10, 2014.

The NRRB remedy review process consists of the following steps: 1) Region 2 develops an information package, with input from the State of New Jersey, which includes stakeholder submissions, if any; 2) Region 2 submits the information package to the Board at least one month prior to the March 2014 meeting, if time allows; 3) at the Board meeting, Region 2 makes an informational presentation; 4) the Board deliberates, focusing on whether the proposed cleanup approach is cost-effective and otherwise consistent with the National Oil and Hazardous Substances Contingency Plan and the most current program guidance; 5) within a few weeks after the meeting, the Board transmits a memorandum to the Regional decision-maker with recommendations and comments; and 6) the Regional decision-maker responds to the Board within a reasonable time.

The NRRB guidelines allow stakeholders such as the company you represent, Cornell-Dubilier Electronics, Inc., to summarize, in 20 pages or less, any technical issues that you believe are pertinent to the selection of a remedy. Please note that while Regional decision-makers give substantial consideration to the Board recommendations, the final decision-making authority rests with the Region.

If you plan to make a submission, it should be sent to EPA Region 2 by the close of business on March 5, 2014. Please submit your comments to the Remedial Project Manager, Mark Austin at austin.mark@epa.gov, and provide a copy to me as well. (You may submit a hard copy but an electronic submission via email will allow the Region to distribute stakeholder positions to the NRRB expeditiously.) To assist you, a disk containing data and figures collected during the RI/FS study is enclosed.

The Board review is considered an internal deliberative process, and your participation is limited to the submission of the 20-page document referenced above. However, before selecting a

Robert Sanoff, Esq.
February 18, 2014
Page 3

remedy for OU4, Region 2 anticipates that the Board recommendations memorandum and the Region's response will be placed in the public administrative record for OU4 and made available for review.

Further information concerning the NRRB may be found at the following website: www.epa.gov/superfund/programs/nrrb/. The website also provides access to the Board's publicly-available review memoranda for sites previously reviewed as well as regional responses to the Board comments involving those sites.

Please do not hesitate to call me at (212) 637-3136 if you have any questions.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Sarah P. Flanagan".

Sarah P. Flanagan
Assistant Regional Counsel

Enclosure